No. 76-153

In the Supreme Court of the United States

OCTOBER TERM, 1976

RUSSEL KELNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 534 F. 2d 1020.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1976, and a petition for rehearing was denied on June 2, 1976 (Pet. App. B). On June 24, 1976, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to August 1, 1976 (a Sunday), and the petition was filed on August 2, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's direct and unambiguous threat to kill a named person violated 18 U.S.C. 875(c) in the absence of proof of his specific intent to carry out the threat.

2. Whether the evidence established that petitioner willfully caused the interstate transmission of a threatening communication, in violation of 18 U.S.C. 875(c) and 2.

STATUTES INVOLVED

18 U.S.C. 875(c) provides:

> Whoever transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of willfully causing the transmittal in interstate commerce of a threat to assassinate Yasir Arafat, in violation of 18 U.S.C. 875(c) and 2. He was sentenced to one year's imprisonment, suspended in favor of four years' probation; he was also fined $1,000. The court of appeals affirmed in a thorough opinion (Pet. App. A).

The facts surrounding the offense are fully set forth in the opinion of the court of appeals (Pet. App. A-2 to A-5). On November 11, 1974, Yasir Arafat of the Palestine

Liberation Orgainization was scheduled to arrive in New York to address the United Nations General Assembly. During a press conference called that afternoon by the Jewish Defense League, petitioner was interviewed by John Miller, a news reporter for WPIX-TV, and announced that "[w]e have people who have been trained and who are out now and who intend to make sure that Arafat and his lieutenants do not leave this country alive"; that "[w]e are planning to assassinate Mr. Arafat"; that "[e]verything is planned in detail"; and that "[i]t's going to come off" (Pet. App. A-4). These threats, made before a television camera and microphone, were broadcast in their entirety that evening on the WPIX ten o'clock news. WPIX is a New York television station, licensed by the Federal Communications Commission, which has a broadcast range extending into Connecticut and New Jersey.

ARGUMENT

1. Petitioner contends (Pet. 6-8) that his statements of "vigorous opposition to Arafat" were announcements on an issue of public importance rather than "threats," within the meaning of Section 875(c), and that they were protected by the First Amendment in the absence of a showing that he had the specific intent to carry out the threats. It is undisputed, however, that the First Amendment does not prevent enactment of criminal statutes that punish words alone, and that there are "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-572. Many federal criminal statutes punish words alone,[1] and

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[1]See, *e.g.*, 18 U.S.C. 871, 876, 877; 18 U.S.C. 401 (contempt); 18 U.S.C. 1621, 1623 (perjury); 18 U.S.C. 1501, 1503, 1505, 1509, 1510 (obstruction of administrative or judicial proceedings or investigations by threats); 18 U.S.C. 245 (interference with federally protected activities by threats).

the interstate transmission of a threat to kidnap or injure another person clearly falls within the categories of expression that the government may legitimately prohibit. Such threats cannot realistically be considered as advocacy and bear no resemblance to the type of speech protected by the First Amendment. They do not seek to persuade the hearer nor do they invite rational discourse. Instead, threats to inflict bodily harm serve only to induce fear and emotional suffering among the persons to whom they are addressed. Thus, they do not implicate the central policy of the First Amendment that "speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies." *Dennis* v. *United States*, 341 U.S. 494, 503.

Section 875(c), therefore, is constitutional on its face (cf. *Watts* v. *United States*, 394 U.S. 705, 707). While petitioner does not contend otherwise, he argues that serious First Amendment problems would arise if the statute were construed not to require proof of a defendant's "specific intent to carry out the threat" (Pet. 6). We fail to see why this should be so. As petitioner concedes (Pet. 9), the legislative purpose behind the enactment of Section 875(c) was to prevent the facilities of interstate commerce from being used to convey threats of injury that were likely to inflict pain, emotional suffering or other social harm. The existence of this evil depends solely upon an objective interpretation of the words uttered and the import that the defendant intended his remarks would be given, not on his subjective intent to execute the threat. It would be strange indeed if a person who uttered a threat to harm another, intending that his words be viewed as a legitimate threat and accomplishing that result, could escape punishment by successfully contending that he had no intention of

carrying out his threat. It is therefore not surprising that, in the context of a related statute, petitioner's claim has been rejected by every court of appeals to have considered it.[2]

To be sure, substantial constitutional problems might arise if "threats," as used in the statute, were given the broadest possible meaning, and if "true 'threats' " (*Watts* v. *United States, supra,* 394 U.S. at 708) were not sufficiently distinguished from "political hyperbole" or other protected forms of speech. The court of appeals, however, construed Section 875(c) as applicable only if " the threat

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[2]The issue whether a specific intent to carry out a threat is an element of the offense under a related statute (18 U.S.C. 871(a)) involving threats to take the life of or to inflict bodily harm on the President was before the Court but not decided in *Rogers* v. *United States*, 422 U.S. 35. The following cases have held that, under Section 871(a), an intent to make a threat, together with an apparent intent to carry out the threat, is sufficient: *United States* v. *Hall*, 493 F. 2d 904 (C.A. 5), certiorari denied, 422 U.S. 1044; *United States* v. *Lincoln*, 462 F. 2d 1368 (C.A. 6), certiorari denied, 409 U.S. 952; *United States* v. *Hart*, 457 F. 2d 1087 (C.A. 10), certiorari denied, 409 U.S. 861; *United States* v. *Compton*, 428 F. 2d 18 (C.A. 2), certiorari denied, 401 U.S. 1014; *Roy* v. *United States*, 416 F. 2d 874 (C.A. 9); *Watts* v. *United States*, 402 F. 2d 676 (C.A.D.C.), reversed on other grounds, 394 U.S. 705; *Ragansky* v. *United States*, 253 Fed. 643 (C.A. 7). In *United States* v. *Patillo*, 438 F. 2d 13 (C.A. 4) (*en banc*), the court held that the government must show either an intent to carry out a threat to kill or injure the President or an intent to disrupt Presidential activites, and that the latter might be implied "from the nature of the publication of the threat, *i.e.*, whether the person making the threat might reasonably anticipate that it would be transmitted to law enforcement officers and others charged with the security of the President." *Id.* at 16. Since petitioner's threats, which were broadcast over television, were certainly of a type that "would be transmitted to law enforcement officers and others charged with the security of" Arafat, his conduct would be punishable even under the test adopted in *Patillo*. We note in addition that Section 871(a), unlike Section 875(c), requires that the threat be made "willfully." See *Watts* v. *United States, supra,* 394 U.S. at 707-708.

on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution * * *" (Pet. App. A-16). And, as the court observed, the trial judge "left it to the jury to determine whether [petitioner] 'intended the words as a threat against Yasser Arafat and his lieutenants . . . or whether he said those words as a statement of opposition to Arafat . . .'" (Pet. App. A-11):

> The court charged the jury that "[m]ere political hyperbole or expression of opinion or discussion does not constitute a threat" and stated that if the jury found that the statements were "no more than an indignant or extreme method of stating political opposition to Arafat or the PLO" it would be justified in "finding that no threat was in fact made." The jury finding of guilty, therefore, is predicated on the judgment that there was here a genuine threat to kill which, even though it might have been made in the context of a protest against PLO outrages, did not constitute only a political expression of opinion. In order to convict under the charge given, the jury had to, and we must assume did, find that the statements were *more* than political, that they were "an expression of a intention to inflict" injury, of "such a nature as could reasonably induce fear."

The jury's verdict, which was supported by the evidence (including petitioner's own admissions), establishes that petitioner's statements that he and his colleagues intended to kill Arafat were "true 'threats,'" intended to be viewed as such, rather than mere "political hyperbole." See *United States* v. *Cooper*, 523 F. 2d 8, 10 (C.A. 6); *United States* v. *Bozeman*, 495 F. 2d 508, 510-511 (C.A. 5), certiorari denied, 422 U.S. 1044.

2. Petitioner contends (Pet. 8-10) that, for a variety of reasons, the application of Section 875(c) to the facts of this case extends the statute beyond its intended reach. At the outset, we note that the premise of petitioner's claim that the statute was "stretched" to cover his conduct—that "Section 875(c) of Title 18 was designed to prohibit the interstate transportation of extortion demands" (Pet. 8)—is incorrect. Section 875(c) expressly prohibits the transmission in interstate commerce of "*any* communication containing *any* threat to kidnap any person or *any* threat to injure the person of another (emphasis added)." Congress enacted a separate provision, Section 875(b), which contains a more severe penalty, to prohibit the interstate transmission of threats that are made "with intent to extort from any person * * * any money or other thing of value * * *."

a. Petitioner first argues (Pet. 9) that Section 875(c) was not intended to apply to threats to injure a specific individual that are broadcast at large rather than transmitted merely to the intended victim. This argument is belied both by common sense—its acceptance, as the court of appeals noted, would leave "a gaping hole in [the] statutory prohibition" and would allow "any would-be threatener [to] avoid the statute by seeking the widest possible means of disseminating his threat" (Pet. App. A-8)—and by the legislative history of the statute.

As originally drafted, Section 875(c) proscribed the transmission in interstate commerce of extortionate threats "by means of telephone, telegraph, radio, or oral message or otherwise * * *." Prior to its enactment in 1934, however, the statute was amended to omit all references to specific modes of communication and to prohibit all transmissions of extortionate threats in interstate commerce "by any means whatsoever." H.R.

Rep. No. 1456, 73d Cong., 2d Sess. (1934). The statute was subsequently amended to apply to "[any] communication containing any threat," not merely threats of an extortionate nature. See H.R. Rep. No. 102, 76th Cong., 1st Sess. (1939). Finally, in 1948 Congress deleted the phrase "by any means whatsoever," which had been rendered redundant by the earlier inclusion of "any communication" within the statute. See the Act of June 25, 1948, c. 645, 62 Stat. 741; H.R. Rep. No. 304, 80th Cong., 1st Sess. (1948). Thus, from the beginning Section 875(c) was intended to cover threatening communications that were broadcast; nothing in the legislative background indicates a congressional intent to exempt any class of interstate communications from the statute.[3]

b. Petitioner claims (Pet. 9), without citation of authority, that the legislative history of Section 875(c) indicates that Congress intended the statute to apply only to communications from a person in one state to an intended victim in another state.[4] But this argument, as the court of appeals remarked (Pet. App. A-9), "misapplies both the language and the scheme of the statute." The *transmission* of a threat to kidnap or injure another person, not its *receipt*, is the evil against which the statute is directed, and Congress clearly intended "the withdrawal of interstate facilities for the achievement of the proscribed evil" (Pet. App. A-10). Thus, the offense is complete once the threat has travelled in interstate commerce, regardless of the location of the victim at that

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[3]Indeed, wide dissemination of an illegal threat is likely to generate increased alarm and emotional suffering.

[4]Although Arafat had been expected to arrive in New York on November 11, 1975, his whereabouts at the moment that petitioner's threat was transmitted was not established at trial.

time. Indeed, the target of the threat need not even have received the communication. See *United States* v. *Holder*, 302 F. Supp. 296, 301 (D. Mont.), affirmed, 427 F. 2d 715 (C.A. 9). The proof at trial that petitioner's televised statements were broadcast from New York into Connecticut and New Jersey (Tr. 32) was sufficient to satisfy the jurisdictional requirement of Section 875(c).

c. Finally, petitioner argues (Pet. 9-10) that the evidence was insufficient to support his conviction because the actual interstate transmission of his threat was accomplished by a third party (WPIX) over whom petitioner had no control. This contention is insubstantial. The indictment charged petitioner with having "willfully caused" the transmission in interstate commerce of a threat to injure another person, in violation of 18 U.S.C. 875(c) and 2(b). The district court charged the jury as follows (Tr. 415-416):

> What does the term "wilfully caused" mean? It does not mean that the defendant himself need have held the camera or rolled the film or supervised or participated himself in any way in the actual transmission of the film over WPIX facilities. In the context of this case the term "wilfully caused" means did the defendant take some action without which the communication in interstate commerce would not have occurred. And—I underscore the "and"—did the defendant intend, know, or could he reasonably have foreseen—did he intend, know or have reasonably foreseen [sic]—that his statement would be transmitted in interstate commerce by others.

Petitioner did not object to this instruction (see Fed. R. Crim. P. 30), which was a correct statement of the law. See *Pereira* v. *United States*, 347 U.S. 1, 9; *United States* v. Giles, 300 U.S. 41, 48-49; *United States* v. *Kenofskey*, 243 U.S. 440, 443. As the court of appeals concluded,

a person is guilty of a violation of Section 875(c) even though his threat was transmitted through an innocent intermediary, if the transmission in interstate commerce was reasonably foreseeable (Pet. App. A-7 to A-8):

> Here the evidence was quite clear that the JDL called the press conference and that during the conference [petitioner] knew that he was being interviewed by television when he made the threat. [Petitioner] does not seriously dispute the sufficiency of the evidence in this regard. The cases which [petitioner] has cited to us, *Terry* v. *United States*, [131 F. 2d 40 (C.A. 8)], *United States* v. *Fox*, [95 U.S. 670], and *United States* v. *Dietrich*, [126 Fed. 676 (D. Neb.)], all involved an intervening act by a third party that could *not* have been foreseen or was against the will of the alleged defendant. Those cases are plainly inapposite at this appeal.

Indeed, since the interstate transmission of a person's statements may often occur through the acts of a third party—*e.g.*, the telephone company, the postal service, or a private messenger—"[t]o hold that [Section 875(c)] applies only when the accused personally [transmits the threat] or affirmatively directs another so to do would emasculate the statute—defeat the very end in view." *United States* v. *Giles*, *supra*, 300 U.S. at 48-49.[5]

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[5]While a common carrier, unlike a television station, may have an obligation to transmit all prepaid messages it receives, this factor relates only to a defendant's knowledge or intent that this threat will be transmitted in interstate commerce—a question properly left to the jury.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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